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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1406

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,
Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California.

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Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California.

The Respondents Greater Westchester Homeowners Association, et al. (hereafter, the Homeowners), forty-one neighbors of Los Angeles International Airport who were awarded damages because of the injurious way in which the City of Los Angeles operates its airport, respectfully request this Court to deny the petition for writ of certiorari.

In applying settled federal law, the California Supreme Court (which unanimously reached the same conclusion as the Superior Court and the Court of Appeal) simply held a tortfeasor accountable for the consequences of its own conduct. The City's petition ignores its own causative role in the Homeowners' injuries. The California Supreme Court did not (see 26 Cal.3d at 98-99). The City's petition also ignores express Congressional preservation of suits such as this (49 U.S.C. §1506).

Question Presented.

(a) Where Congress, the Department of Transportation, the FAA, the CAB and the federal judiciary have repeatedly and consistently declared that airport operators have the power to enact regulations to control noise generated by aircraft using their facilities, and

(b) where Congress expressly says that—notwithstanding its extensive federal regulatory scheme—common law actions may coexist harmoniously with the federal regulations, then

Question: is it proper for a court to determine that an airport operator's failure to properly exercise its noise control power renders the operator liable to its neighbors for damage caused by such failure?

Additional Statutes and Regulations Involved.

The following pertinent statutes and regulations are not cited or quoted in the petition.

49 U.S.C. §1506:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

42 U.S.C. §7604(e):

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

49 U.S.C. §1305(b)(1):

> "Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political

subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights." (Section 105[b][1]; emphasis added.)

14 C.F.R. §36.5:

"Pursuant to 49 U.S.C. 1421(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination was made, under this part, that these noise levels are or should be acceptable for operation at, into, or out of any airport."

Statement of the Case.

The City's factual presentation lacks candor. It fails to present to this Court the factual basis for the California Supreme Court's decision.

This suit seeks to have an airport operator accept the financial responsibility for the consequences of operating its airport in the manner it has chosen.

As the City acknowledges, this Court has established that airport operators are liable for property damage caused by the noise of aircraft in flight. (*Griggs v. Allegheny County* [1962] 369 U.S. 84.) The *Griggs* rule is not directly challenged by the City. But its rationale is *sub silentio* called in question. The airport operator was held liable in *Griggs* because of the operator's choice of location, failure to acquire buffer zones, and similar decisions which combined to cause injury to nearby property.

The City's petition opts for a neutron bomb approach: *i.e.*, the City acknowledges its duty to protect *property*, but feels no responsibility for the *people* who *live* on the property. Every level of California court expressly repudiated

such an "ignore the people" approach (26 Cal.3d at 98). It is no more persuasive this fourth time around.

The City does not challenge the sufficiency of the evidence to sustain the judgment. That evidence demonstrated the anguish suffered by the Homeowners because of the way in which the City conducts its airport operations.

The trial court summed up the evidence as follows:

> "The testimony of the plaintiffs as to the effects suffered by them from the aircraft noise . . . established that the jet aircraft noise interfered with person-to-person conversation in the home, with the ability to engage in normal telephonic communication, with the ability to enjoy the use of the out-of-doors' portion of their property and with the ability to hear and enjoy television programs; that such noise caused frequent arousal from sleep and, in some cases, interfered with the ability to engage in or to enjoy sexual relations. With respect to family members of school age, the testimony was to the effect that the jet aircraft noise interfered with the ability to study in the home." (Pet., App. C, p. 59).
>
> "The defendant City's acts of permitting jet aircraft to use the runways of the Los Angeles International Airport and emit the kind of noise which is injurious to health or offensive to the senses so as to interfere with plaintiffs' comfortable enjoyment of their homes constitute a method and manner of operating said Airport that creates a nuisance for which the defendant City becomes liable in damages." (Pet., App. C, p. 42).

Omitted entirely from the City's factual statement is a discussion of the acts of the City which caused the Home-

owners' injuries. Instead, the City prefers to place the blame on ". . . aircraft in flight . . ." (Pet. 1, 2, 8, 12).

A fair presentation of the facts would have explained the City's active participation in the Homeowners' injury. This is discussed by the California Supreme Court, 26 Cal.3d at 98-99. Suffice it to note at this point that it was the City (not the pilots, the airlines or any other government agency) that chose where to locate the airport, designed the airport, decided on the location and direction of the runways, decided how much neighboring property to acquire as a buffer area, refused to institute noise control procedures and assiduously sought huge federal grants to expand its number of jet operations without thought about the impact of the increased use on its neighbors.

Although the airlines and aircraft using the airport possess various certificates from the FAA and the CAB, *none* of these certificates either authorizes or requires their use in local situations where they may cause injury. Indeed, such authorization is *expressly disclaimed*. *E.g.*, while the FAA certifies aircraft for use, its regulations warn:

> "Pursuant to 49 U.S.C. 1421(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. *No determination was made, under this part, that these noise levels are or should be acceptable for operation at, into, or out of any airport.*" (14 C.F.R. §36.5; emphasis added.)

Contrary to what one would conclude from the City's factual presentation, this suit asks the City to account for *its own* actions.

That is all the judgment does.

REASONS WHY THE WRIT SHOULD BE DENIED.

1

Damage Actions Are Not "Federally Pre-empted". Federal Statutes Expressly Authorize the Type of Common Law Action at Bench.

The City's assertion that the Homeowners' damages are somehow "federally pre-empted" is puzzling. The federal statutes dealing with aviation demonstrate the contrary.

Determining congressional *intent* to pre-empt or not preempt is fundamental. It is *intent* which this Court has repeatedly held to be determinative.

In *Schwartz v. Texas* (1952) 344 U.S. 199, 202, 203, this Court stated:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a *clear manifestation of intention* to do so. The exercise of federal supremacy is not lightly to be presumed.
>
> "The principle thus applicable has been frequently stated. It is that the *Congress may* circumscribe its regulation and *occupy a limited field,* and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State. [citations]" (Emphasis added.)

Well, then, what's the situation at bench? Did Congress intend a *total* pre-emption? Or, was its goal more limited?

Congress has enacted four groups of statutes regulating aviation. Each of them preserves damage actions.

The Federal Aviation Act of 1958, 49 U.S.C. §§1301-1542 is the most pervasive. It occupies chapter 20 of Title 49 of the United States Code, and governs the CAB as well as the FAA, and economic as well as safety and noise regulation of civil aviation.

Notwithstanding this extensive regulation, 49 U.S.C. §1506 expressly *permits* common law suits such as the Homeowners':

> "*Nothing* contained in this chapter shall *in any way* abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (Emphasis added.)

The Airport and Airway Development Act of 1970 (49 U.S.C. §§1701-1742) has been held expressly enforceable by airport neighbors in suits against airport operators. *City of Inglewood v. City of Los Angeles* (9th Cir. 1971) 451 F.2d 948, 955-956. See also *Miree v. Dekalb County* (1977) 433 U.S. 25.

The Clean Air Amendments of 1970 also expressly permit suits by private citizens (42 U.S.C. §7604[e]):

> "*Nothing* in this section shall restrict *any right* which *any person* (or class of persons) may have under any statute or *common law* to seek enforcement of any emission standard or limitation or to seek any other relief (including relief *against* the Administrator or a *State agency*)." (Emphasis added.)

This is relevant because a jet's black trail of exhaust emissions, fumes and sooty fallout, are significant parts of the injury to the Homeowners.

The aviation provisions of the Noise Control Act of 1972, 49 U.S.C. §1431, are codified as part of chapter 20 of Title 49 U.S.C. They are thus subject to 49 U.S.C. §1506 quoted above.

Indeed, this Court recently confirmed the propriety of private, common law actions affecting aviation, though subject to exclusive federal (CAB) regulation. See *Nader v. Allegheny Airlines, Inc.* (1976) 426 U.S. 290, 298-300.

Thus, assuming *arguendo* that Congress had an intent that local *regulation* of flights be "pre-empted", private *actions for damages* are permitted for adverse consequences of the regulated (flight) activity.[1]

This Court recently dealt with a similar problem (also arising i California) under the National Labor Relations Act. In *Farmer v. United Brotherhood of Carpenters* (1977) 430 U.S. 290, this Court vacated the judgment of a California Court of Appeal and held that the National Labor Relations Act did *not* pre-empt the right of a union member to sue a union for tort in state court. In upholding the individual's right to maintain common law, state court suits in a Federally regulated area, this Court emphasized the state's interest in protecting its citizens from tortious injury, and the concurrent lack of Federal interest in protecting tortious conduct from redress (430 U.S. at 299-303.)[2] (Likewise, see *Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 194-198; *United Construction Workers v. Laburnum Constr. Corp.* (1954) 347 U.S. 656, 663-664.)

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[1]In *Luedtke v. County of Milwaukee* (E.D. Wis. 1974) 371 F.Supp. 1040, aff'd, (7th Cir. 1975) 521 F.2d 387 (cited in the Petition), the U.S. District Court dismissed the action against the airport operator on the ground that *the state court was the appropriate forum* for trying all claims—including claims for *punitive damages* (see 371 F.Supp. at 1044). That is hardly authority for dismissing a *state court* cause of action. Indeed, it appears to be the contrary.

[2]That is why the City's reliance on *San Diego Bldg. Trades Council v. Garmon* (1959) 359 U.S. 236, is misplaced. *Garmon* dealt with a field almost totally pre-empted. That is not so here. But even in *Garmon's* field (labor relations) this Court has consistently recognized exceptions and permitted common law tort suits. And recall that in the aviation context, there is express recognition of such suits (49 U.S.C. §1506) which is absent in labor law.

The same is true here. California courts have both a Constitutional mandate (Cal. Const., Art.1, §1) and legitimate interest in protecting Californians from tortious injury inflicted by jet noise and air pollution. Likewise, though Congress has sought to foster aviation, it does *not* condone nor require operation of jet airports in such a manner or location that injury is inflicted on their neighbors. Quite the contrary. As discussed below, the position of the Federal government has been consistent and clear: it is the responsibility of each airport operator to ensure that its airport is operated under such local regulations as will avoid injury to nearby people and property—even if that means excluding noisy aircraft.

2

All Branches of the Federal Government—Legislative, Executive and Judicial—Have Repeatedly Re-affirmed the Power of Airport Operators to Control Aircraft Noise.

It is startling that the City's petition seeks to create the impression that the Federal government has so occupied the field that no room is left for airport operators—acting as proprietors—to control what happens at their own facilities. The City is able to so assert only by mis-stating the holding in the authority it *does* cite (*City of Burbank v. Lockheed Air Terminal, Inc.* [1973] 411 U.S. 624), [3] and by omitting *any* but the most oblique reference[4] to the continuous state-

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[3] *Burbank* involved police power regulation by the city in which an airport was located. It did *not* involve the power of an airport proprietor.

[4] See Pet. 14 where, without noting the conflict with the sweeping generalities presented elsewhere in the petition, the City says:

> "Petitioner is not unmindful of the progeny of *Burbank*, which recognize the power of an airport proprietor to impose reasonable and nondiscriminatory airport use restrictions which do not create a burden on interstate commerce."

Candor would seem to call for a discussion of—or at least a citation to—". . . the progeny of *Burbank* . . ."

ments to the contrary by the federal judiciary, Congress, the Department of Transportation, the FAA and the CAB. The California Supreme Court was not taken in by the City's evasion-of-contrary-authority ploy. The decision below simply applies settled federal law.

First. While attempting to provide federal impetus to control noise, Congress has consistently recognized the role of local government.

The Noise Control Act of 1972 provides:

> "(3) that, while *primary responsibility for control of noise rests with State and local governments*, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment." (42 U.S.C. §4901[a][3]; emphasis added.)

With respect to aircraft noise, the federal role has been to establish certification standards for types of aircraft (Federal Aviation Regulations, part 36). But these FAA standards—on their face—authorize *more stringent regulation by airport operators:*

> "Pursuant to 49 U.S.C. 1421(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. *No determination was made, under this part, that these noise levels are or should be acceptable for operation at, into, or out of any airport.*" (14 C.F.R. §36.5; emphasis added.)

Moreover, the Airline Deregulation Act of 1978 provides:

> "*Nothing* in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States *as the owner*

> *or operator of an airport* served by any air carrier certificated by the Board *to exercise its proprietary powers and rights.*" (49 U.S.C. §1305[b][1]; emphasis added.)

The CAB reads this section as preserving the proprietary rights historically enjoyed by airport operators. In its initial statement of policy under the Act (Feb. 7, 1979), the CAB said:

> ". . . State and local authorities may continue to exercise their proprietary powers and rights as owners or operators of airports served by federally certificated air carriers." (44 Fed. Reg. 9949.)
>
> "Finally, we conclude that Congress has not changed the *status quo* with respect to the rights and powers of local governments to take certain actions in their capacity as airport owners and proprietors under case law. See, *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 635, n.14 (1973)." (44 Fed. Reg. 9951.)

Congress has recognized the proprietary power of airport operators to control noise, and the CAB and FAA acknowledge that power.

Second. The Courts have confirmed this power. In the Concorde controversy, the Second Circuit Court of Appeals put it this way:

> "*The task of protecting the local population from airport noise, however, has fallen to the agency, usually of local government, that owns and operates the airfield. Air Transport Ass'n v. Crotti,* 389 F.Supp. 58 [ND Cal. 1975] (three judge court); *National Aviation v. City of Hayward,* 418 F.Supp. 417 (ND Cal. 1976). It seemed fair to assume that the proprietor's intimate knowledge of local conditions, as well as his

> ability to acquire property and air easements and assure compatible land use, *cf. Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed. 585 (1962), would result in a rational weighing of the costs and benefits of proposed service. Congress has consistently reaffirmed its commitment to this two-tiered scheme, and both the Supreme Court and executive branch have recognized the important role of the airport proprietor in developing noise abatement programs consonant with local conditions." (*British Airways Bd. v. Port Authority* [2d Cir. 1977] 564 F.2d 1002, 1010-1011; emphasis added.)

In what has become a famous footnote, this Court approvingly quoted some legislative history in *City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624, 635, fn. 14:

> "The letter from the Secretary of Transportation also expressed the view that the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise* which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently *deny the use of their airports* to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory . . . This portion as well was quoted with approval in the Senate Report." (Emphasis added.)

The *Burbank* rule has been applied repeatedly by the federal courts.[5] *E.g., in National Aviation v. City of Hayward* (N.D. Cal. 1976) 418 F.Supp. 417, 424:

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[5]In addition to the cases quoted in the text, see *British Airways Bd. v. Port Authority* (2d Cir.1977) 558 F.2d 75, 81-82; *City of Blue Ash v. McLucas* (6th Cir. 1979) 596 F.2d 709, 712; *cf. Port of New York Authority v. Eastern Air Lines, Inc.* (E.D. N.Y. 1966) 259 F.Supp. 745, 751-752.

"Accordingly, while the Congressional purpose was undoubtedly clear enough to the *Burbank* majority to rule that a municipality's police power regulations regarding aircraft noise at an airport, *which it was not the proprietor of*, invaded an area exclusively reserved for federal control, this court cannot, in light of the clear Congressional statement that the amendments to the Federal Aviation Act were not designed to and would *not 'prevent airport proprietors from excluding any aircraft on the basis of noise considerations,'* make the same finding with respect to regulations adopted *by municipal airport proprietors*." (418 F.Supp. at 424; emphasis added; footnotes omitted.)

A three judge District Court explained it this way:

"It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative. . . . *That correlating right of proprietorship control is recognized and exempted form judicially declared preemption by footnote 14.*" (*Air Transport Assn. v. Crotti* [N.D. Cal. 1975] 389 F.Supp. 58, 63-64 emphasis added.)

Another court aptly summed it up:

"The courts recognize that an airport proprietor may restrict the use of its facilities on the basis of noise considerations without running afoul of the preemption doctrine. [Citations]" (*San Diego Unified Port Dist. v. Gianturco* [S.D. Cal. 1975] 457 F.Supp. 283, 291.)

The federal judiciary has thus repeatedly and unequivocally confirmed the power of airport proprietors.

Finally. The executive branch has repeatedly acknowledged the scope of proprietor power. As the FAA summed it up in June, 1978:

> "Congress has the power under the Constitution to regulate the operations of airports for noise abatement purposes, but it has chosen not to do so. *This congressional policy leaves airport proprietors responsible for the regulation of their airports for noise abatement purposes*. The proprietors may issue noise-related airport use restrictions that are not unjustly discriminatory and do not impose an undue burden on interstate or foreign commerce. The Chicago Convention and bilateral air services agreements do not alter this basic feature of American aviation law." (43 Fed. Reg. 28417; emphasis added.)
>
> "This recognition of the unique capacity and responsibility of the airport proprietor to effect a 'rational weighing of the costs and benefits of proposed service' is the foundation of the 'local option' policy underlying FAA noise abatement rulemaking since part 36 was originally issued in 1969." (43 Fed. Reg. 28417.)

This recent statement confirmed a November, 1976 FAA policy decision (FAA, *Aviation Noise Abatement Policy* [Nov. 18, 1976]):

> "Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. *We have* been urged to undertake—and have *considered carefully and rejected—full and complete federal preemption of the field of aviation noise abatement*. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users,

and governments.'' (p. 34; emphasis added.)

''The primary obligation to address the airport noise problem always has been and remains a local responsibility.'' (p. 2)

In 1975, the *Crotti* court quoted the FAA as follows (389 F.Supp. at 64):

> ''The preamble to 14 C.F.R., Part 36, emphasizes that *local air proprietors have the responsibility for determining the permissible noise levels for aircraft using their airport:*
>
> '''Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is ''acceptable,'' from a noise standpoint, in particular airport environments. *Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport.* The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those *more restrictive limits determined to be necessary by individual airport proprietors* in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce'; . . .'' (Emphasis added.)

In 1973, this Court—in *Burbank*—quoted a letter from the Secretary of Transportation (the FAA is within the Department of Transportation). The letter had been approvingly quoted in House and Senate reports (411 U.S. at 635, fn. 14):

> ''the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport,* from issuing regulations or establishing re-

quirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." (Emphasis by the Court.)

This acknowledgment has consistently been made by the executive branch in litigation.

For example, in the Concorde litigation, the Court of Appeals said:

> "In response to our request, the United States filed an *amicus* brief in which it urged that Secretary Coleman's order was never intended to deprive the Port Authority of the right to condition utilization of the facilities at JFK on the Concorde's compliance with reasonable noise regulations. *The Government,* indeed, went further, and *denied that existing legislation authorized the Executive under any circumstances to preempt airport proprietors from promulgating their own noise regulations.*
>
> "This conclusive statement of the United States position confirms our independent assessment of the public record." (*British Airways Bd. v. Port Authority* [2d Cir. 1977] 558 F.2d 75, 81-82; emphasis added.)

In short, the legislative, executive and judicial branches of the federal government have repeatedly and consistently acknowledged the regulatory power of airport proprietors.

The California courts imposed liability because of the City's mis-use and non-use of its own power. Contrary to the City's petition, *that* is what this case is all about. It has nothing to do with anyone other than the City "regulating"

the airport. The City has been held accountable for the way it has used and abused its power. Courts have done that for centuries.

Conclusjon.

Factually, the petition ignores the City's active participation in the Homeowners' injury.

Legally, the petition ignores most of the pertinent authorities, and either over-simplifies, over-states or mis-states the few authorities it cites.

The California Supreme Court merely held a tortfeasor accountable for its own actions. That is clearly in line with the Congressional design. That is why Congress expressly preserved common law forms of action (49 U.S.C. §1506) at the time it adopted the extensive federal regulatory format. There is no need to disturb the judgment of the California courts. The Respondents pray that the petition be denied.

Respectfully submitted,

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